



COUR EUROPÉENNE DES DROITS DE L'HOMME
EUROPEAN COURT OF HUMAN RIGHTS

FIRST SECTION

CASE OF ORTNER v. AUSTRIA

(Application no. 2884/04)

JUDGMENT

STRASBOURG

31 May 2007

FINAL

31/08/2007

This judgment will become final in the circumstances set out in Article 44 § 2 of the Convention. It may be subject to editorial revision.

In the case of Ortner v. Austria,

The European Court of Human Rights (First Section), sitting as a Chamber composed of:

Mr C.L. ROZAKIS, *President*,

Mr L. LOUCAIDES,

Mrs N. VAJIĆ,

Mrs E. STEINER,

Mr D. SPIELMANN,

Mr S.E. JEBENS,

Mr G. MALINVERNI, *judges*,

and Mr S. NIELSEN, *Section Registrar*,

Having deliberated in private on 10 May 2007,

Delivers the following judgment, which was adopted on that date:

PROCEDURE

1. The case originated in an application (no. 2884/04) against the Republic of Austria lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms (“the Convention”) by an Austrian national, Mr Anton Ortner (“the applicant”), on 15 January 2004.

2. The applicant was represented by Mr E. Stöger, a lawyer practising in Innsbruck. The Austrian Government (“the Government”) were represented by their Agent, Ambassador F. Trauttmansdorff, Head of the International Law Department at the Federal Ministry of Foreign Affairs.

3. On 7 December 2005 the Court decided to give notice of the application to the Government. Applying Article 29 § 3 of the Convention, it decided to rule on the admissibility and merits of the application at the same time.

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

4. The applicant was born in 1942 and lives in Tristach.

5. On 27 February 1968 the Agricultural Authority (*Agrarbezirksbehörde*) instituted land consolidation proceedings (*Zusammenlegungsverfahren*) involving the applicant's property. The applicant did not appeal.

6. On 26 April 1974 the Agricultural Authority issued the occupation and valuation schedule (*Besitzstandsausweis und Bewertungsplan*).

7. By letter of 26 May 1995 the applicant requested that his property be excluded from the consolidation proceedings.

8. By decision of 13 January 1999 the Agricultural Authority notified the parties to the land consolidation proceedings that a valuation plan concerning the electric installations was held at their disposal at the office of the Tristach municipality and could be consulted during two weeks. The applicant appealed on 23 February 1999 against this notification to the Provincial Land Reform Board (*Landesagrarsenat*). He submitted in particular that the occupation and valuation schedule had not been duly served on him. Moreover, he noted that his request to exclude his land from the consolidation proceedings had still not been dealt with. He repeated this request and claimed, in general terms, that he did not have any interest in the land consolidation at issue.

9. On 1 March 1999 the Agricultural Authority dismissed the applicant's request of 26 May 1995 to exclude his property from the consolidation proceedings. It noted that an exclusion of property was not admissible, once the occupation and valuation schedule had become final. The applicant appealed against this decision, alleging that the occupation and valuation schedule had neither been served on him nor had it been duly published. Moreover, a new valuation would be required in the circumstances.

10. On 29 April 1999 the Provincial Land Reform Board dismissed the applicant's appeal. It found that the occupation and valuation schedule had been served in accordance with the relevant procedural rules.

11. On 27 May 1999 the Provincial Land Reform Board dismissed the applicant's appeal against the notification of 13 January 1999. It noted that the occupation and valuation schedule had become final. The additional valuation of electric installations had become necessary by a change in law and had been carried out correctly. Further it noted that the question whether a revision of the original occupation and valuation scheme was required was not the subject of the present appeal proceedings.

12. The applicant filed complaints with the Administrative Court (*Verwaltungsgerichtshof*) against both decisions of the Provincial Land Reform Board. He repeated in essence the arguments he had raised before that Board. The Administrative Court received his complaints on 4 June and 21 July 1999, respectively. Upon the Administrative Court's request the applicant amended his complaint against the Provincial Land Reform Board's decision concerning the electric installations.

13. The Provincial Land Reform Board filed observations with the Administrative Court on 18 August and 28 October 1999, respectively.

14. On 3 July 2003 the Administrative Court, having joined the applicant's complaints, dismissed them. It confirmed the Provincial Land Reform Board's legal assessment.

15. On 13 April 2005 the Agricultural Authority held a hearing concerning the additional valuation of electric installations. It issued a decision on this subject on 19 April 2005.

16. On 3 January 2006 the applicant filed an application under Section 73 of the General Administrative Proceedings Act (*Allgemeines Verwaltungsverfahrensgesetz*) complaining that the proceedings, which were pending since 1968 were still not terminated and that the Agricultural Authority had only held one hearing since mid 2003.

17. The Provincial Land Reform Board, on 2 March 2006, dismissed the application under Section 73 of the GAPAs as being inadmissible. It noted that such an application was only available where the authority had failed to decide on a specific application or on an appeal of a party. The applicant had not filed any specific application.

18. No consolidation scheme has been issued to date. Therefore, the proceedings are still pending.

II. RELEVANT DOMESTIC LAW

19. Section 73 of the General Administrative Proceedings Act (*Allgemeines Verwaltungsverfahrensgesetz*) deals with the administrative authorities' duty to decide. So far as relevant, it reads as follows:

“(1) Subject to any contrary provision in the administrative regulations, the authorities must give a decision on applications by parties ... and appeals without unnecessary delay, and at the latest six months after the application or appeal has been lodged.

(2) If the decision is not served on the party within this time-limit, jurisdiction will be transferred to the competent superior authority upon the party's written request (*Devolutionsantrag*). ...This request has to be refused by the competent superior authority if the delay was not caused by preponderant fault of the authority.

(3) The period for giving a decision by the superior authority runs from the date the request for transfer of jurisdiction was lodged with it.”

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 6 § 1 OF THE CONVENTION

20. The applicant complained that the length of the land consolidation proceedings had been incompatible with the “reasonable time” requirement, laid down in Article 6 § 1 of the Convention, which reads as follows:

“In the determination of his civil rights and obligations ..., everyone is entitled to a ... hearing within a reasonable time by [a] ... tribunal...”

A. Admissibility

1. The period to be taken into consideration

21. The Government argued that two sets of proceedings have to be distinguished in the present case, namely the proceedings concerning the applicant's request of 26 May 1995 to exclude his property from the land consolidation proceedings and the proceedings concerning the valuation of the electric installations, which started on 13 January 1999. While they did not submit any argument as regards the latter, they asserted that the first set of proceedings was not to be taken into account. In their view it did not concern a dispute over the applicant's civil rights and obligations as no right to appeal against the inclusion of property in the land consolidation proceedings lies, once the valuation and occupation schedule has become final.

22. The applicant submitted that the land consolidation proceedings are to be seen as a whole and are not to be split up into separate sets of proceedings. He takes February 1968 as the starting point for the calculation of the duration of the proceedings and, thus, argues that they have already lasted some thirty-nine years.

23. The Court finds that the land consolidation proceedings at issue are to be regarded as a whole for the purpose of assessing their length (see *Wiesinger v. Austria*, judgment of 30 October 1991, Series A no. 213, p. 20, § 52). However, in accordance with its case-law in similar cases, the date when a “dispute” arose is to be taken as a starting point for the calculation of the length of proceedings (see *Kolb and Others v. Austria*, nos. 35021/97 and 45774/99, § 49, 17 April 2003, and *Kern v. Austria*, no. 14206/02, § 51, 24 February 2005). Consequently, the period to be taken into consideration began on 26 May 1995, when the applicant requested that his property be excluded from the proceedings. The Court notes that these proceedings concerned the validity of the inclusion of the applicant's property in the land consolidation proceedings and, thus, a dispute which was directly decisive for the applicant's civil rights and obligations. The proceedings have not yet ended since the consolidation plan has not yet been adopted. They have thus lasted for almost twelve years.

2. The Government's objection based on non-exhaustion of domestic remedies

24. The Government argued that the applicant failed to exhaust domestic remedies in the proceedings concerning his request to exclude his property

from the land consolidation proceedings since he did not make use of the application for transfer of jurisdiction pursuant to Section 73 of the General Administrative Proceedings Act.

25. The applicant contested the Government's view, arguing that land consolidation proceedings did for the most part not depend on applications or appeals of the parties but were to be conducted *ex officio* by the authorities. In fact, a request for transfer of jurisdiction pursuant to Section 73 which he submitted on 3 January 2006 remained unsuccessful. In any case, the main delays in the present proceedings occurred before the Administrative Court. No remedy lies against the length of proceedings before that court.

26. The Court reiterates that an application for transfer of jurisdiction is in principle an effective remedy as regards complaints about the length of proceedings before administrative authorities (see *Egger v. Austria* (dec.), no. 74159/01, 9 October 2003) and also in the specific context of the length of land consolidation proceedings (see *Kern*, cited above, § 49). The applicant did not make use of this remedy as regards the delay caused by the Agricultural Authority, which did not decide on his application of 26 May 1995 until 1 March 1999. The Court is not convinced by the applicant's argument since this part of the proceedings concerned an application filed by him and the request under Section 73 of the General Administrative Proceedings Act was therefore available. The applicant has therefore failed to exhaust domestic remedies for the period from 26 May 1995 until 1 March 1999. Thereafter no delays occurred before the Provincial Land Reform Board and no remedy lies against delays caused by the Administrative Court.

27. It follows that this complaint must be rejected under Article 35 §§ 1 and 4 of the Convention for non-exhaustion of domestic remedies as far as the period from 26 May 1995 until 1 March 1999 is concerned.

28. Consequently, the Court can only examine the remaining period after 1 March 1999. Since the land consolidation proceedings are still pending, the relevant period has so far lasted more than eight years.

29. The Court notes that this part of the complaint is not manifestly ill-founded within the meaning of Article 35 § 3 of the Convention. It further notes that it is not inadmissible on any other grounds. It must therefore be declared admissible.

B. Merits

30. The applicant maintained that lengthy periods of inactivity were attributable to the authorities. The Government contested this.

31. The Court reiterates that the reasonableness of the length of proceedings must be assessed in the light of the circumstances of the case and with reference to the following criteria: the complexity of the case, the

conduct of the applicant and the relevant authorities and what was at stake for the applicant in the dispute (see, among many other authorities, *Frydlender v. France* [GC], no. 30979/96, § 43, ECHR 2000-VII).

32. The Court has frequently found violations of Article 6 § 1 of the Convention in cases raising issues similar to the one in the present case (see *Kolb and Others*, cited above, § 56, which concerned land consolidation proceedings which lasted between 7 years and 8 months and 10 years and 4 months, respectively).

33. Having examined all the material submitted to it, the Court considers that the Government have not put forward any fact or argument capable of persuading it to reach a different conclusion in the present case. Although land consolidation proceedings are by their very nature complex (see *Wiesinger*, cited above, p. 21, § 55), the Court notes in particular that considerable delays occurred in the proceedings before the Administrative Court. The latter remained inactive between 28 October 1999 and 3 July 2003, that is for a period of three years and eight months. It appears that following the Administrative Court's decision only one hearing was held in April 2005, while the consolidation plan has still not been adopted. In sum, the Court considers that in the instant case the length of the proceedings was excessive and failed to meet the "reasonable time" requirement.

34. There has accordingly been a breach of Article 6 § 1.

II. ALLEGED VIOLATION OF ARTICLE 1 OF PROTOCOL No. 1

35. The applicant complained that the land consolidation proceedings involve a number of limitations on the use of his property which he considers to be excessive in view of their length. He relies on Article 1 of Protocol No. 1, which reads as follows:

"Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law.

The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties."

Admissibility

36. The Court has found in previous cases that the provisional transfer of land constitutes an interference with the right to property of land owners concerned. A violation may arise where there is an imbalance between the general interest pursued by the consolidation proceedings and the rights of

the individual or, in other words, where the individual has to bear a disproportionate burden (see *Erkner and Hofauer v. Austria*, judgment of 23 April 1987, Series A no. 117, pp. 66-67, §§ 75-79). However, the applicant has not substantiated his complaint. He has not submitted any argument to show that he was made to bear a disproportionate burden. The mere length of the proceedings is not sufficient to show a breach of Article 1 of Protocol No. 1 (see *Wiesinger*, cited above, § 77).

37. It follows that this complaint is manifestly ill-founded and must be rejected in accordance with Article 35 §§ 3 and 4 of the Convention.

III. APPLICATION OF ARTICLE 41 OF THE CONVENTION

38. Article 41 of the Convention provides:

“If the Court finds that there has been a violation of the Convention or the Protocols thereto, and if the internal law of the High Contracting Party concerned allows only partial reparation to be made, the Court shall, if necessary, afford just satisfaction to the injured party.”

A. Damage

39. The applicant claimed 35,000 euros (EUR) in respect of pecuniary damage. He alleges that he suffered losses on account of the limitations placed on the use of his property by the land consolidation proceedings. Moreover, he claimed EUR 70,000 for non-pecuniary damage.

40. The Government contested these claims. They asserted that there was no causal link between the length of the proceedings and the pecuniary damage claimed. As to non-pecuniary damage, they noted that the applicant has not explained to what extent he suffered such damage.

41. The Court notes that the applicant has not substantiated his claim for pecuniary damage. It therefore dismisses the applicant's claim. However, having regard to its case-law in comparable cases (see *Kolb and Others*, cited above, § 67), and ruling on an equitable basis, the Court awards the applicant EUR 5,500 under the head of non-pecuniary damage.

B. Costs and expenses

42. The applicant also claimed EUR 4,439.16 for the costs and expenses incurred in the domestic proceedings and EUR 1,373.94 for those incurred before the Court. These sums include value-added tax (VAT).

43. The Government commented that the costs of the domestic proceedings were not incurred in order to prevent or redress the violation at issue.

44. According to the Court's case-law, an applicant is entitled to reimbursement of his costs and expenses only in so far as it has been shown that these have been actually and necessarily incurred and were reasonable as to quantum.

45. In the present case, the Court observes that the costs of the domestic proceedings were not incurred in order to prevent or redress the unreasonable duration of the proceedings. As to the costs incurred in the Convention proceedings, the Court notes that the application was only partly declared admissible. The Court considers it reasonable to award the applicant the sum of EUR 1,000 under his head. This sum includes VAT.

C. Default interest

46. The Court considers it appropriate that the default interest should be based on the marginal lending rate of the European Central Bank, to which should be added three percentage points.

FOR THESE REASONS, THE COURT UNANIMOUSLY

1. *Declares* the complaint concerning the excessive length of the proceedings admissible, as far as the period after 1 March 1999 is concerned and the remainder of the application inadmissible;
2. *Holds* that there has been a violation of Article 6 § 1 of the Convention;
3. *Holds*
 - (a) that the respondent State is to pay the applicant, within three months from the date on which the judgment becomes final in accordance with Article 44 § 2 of the Convention, EUR 5,500 (five thousand five hundred euros) in respect of non-pecuniary damage and EUR 1,000 (one thousand euros) in respect of costs and expenses;
 - (b) that from the expiry of the above-mentioned three months until settlement simple interest shall be payable on the above amounts at a rate equal to the marginal lending rate of the European Central Bank during the default period plus three percentage points;
4. *Dismisses* the remainder of the applicant's claim for just satisfaction.

Done in English, and notified in writing on 31 May 2007, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Søren NIELSEN
Registrar

Christos ROZAKIS
President